FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 20 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER, APPELLEE.

BRIEF FOR APPELLANT.

EUGENE STANLEY,
Attorney General;
HARRY V. BOOTH,
LEONARD L. LOCKARD,
Counsel for Appellant.

SUBJECT INDEX.

	Page
Opinion Below	1
Statement as to Jurisdiction	1-8
Statement of the Case	8-11
Specification of Errors	12
Summary of Argument	12
Argument	13-16
I. Decision Below	16-19
II. Bender v. Pfaff No Bar	19-20
III. Louisiana Community Not Commercial Partnership	20-23
IV. Is the Act Arbitrary and Capricious	23-24
V. Fourteenth Amendment	24

TABLE OF CASES CITED.

Abie State Bank v. Bryan, 282 U. S. 765, 773, 75 L. Ed. 690	4
Allen v. Henggeler, 32 F. 2d. 69	22-23
Baird v. Lemee, 23 La. Ann. 424	21
Bender v. Pfaff, 282 U. S. 127, 75 L. Ed. 252	13, 19
Breisch v. Central R. R. of New Jersey, 312 U. S. 484, 491, 85 L. Ed. 965	5
Bywater v. Enderle, 175 La. 1098, 145 So. 118	15
Colorado National Bank v. Bedford, 310 U. S. 41, 47, 84 L. Ed. 1067	6-7
Falconer v. Falconer, 167 La. 595, 120 So. 19	22

TABLE OF CASES CITED—(Continued)

	Page
Gully v. First National Bank, 299 U. S. 109, 81 L. Ed. 70	6
Hellberg v. Hyland, 168 La. 493, 122 So. 593	15
Kremer v. Kremer, 121 La. 484, 46 So. 600	15
Mackenroth v. Peike, 171 La. 842, 132 So. 365	21
Millers' Executors v. Swann, 150 U. S. 132, 37 L. Ed. 1028	6
Moffitt v. Kelly, 218 U. S. 400, 54 L. Ed. 1086	24
Peters v. Klein, 161 La. 664	22
Phillips v. Phillips, 160 La. 813, 107 So. 584	13, 14
Poe v. Seaborn, 282 U. S. 101, 75 L. Ed. 239	19
Smith v. Kansas City Title & T. Co., 255 U. S. 180, 65 L. Ed. 577	7-8
State Tax Commission v. Van Cott, 306 U. S. 511, 514, 83 L. Ed. 950	4-5
Succession of Boyer, 36 La. Ann. 506	21
Succession of Clark, 27 La. Ann. 269	15
Succession of Howell, 177 La. 276, 148 So. 48	15
Tyler v. United States, 281 U. S. 496, 74 L. Ed. 991	12, 16-17
United States v. Jacobs, 306 U. S. 363, 83 L. Ed. 763	12, 17-18, 21
Winter v. Gani, 199 So. 600	15
Y. M. C. A. v. Davis, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558	13-14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT,

versus

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER, APPELLEE.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Louisiana in this cause (R. 19) is not reported in the State Reports, but is found in 14 So. 2d. 475.

GROUNDS ON WHICH JURISDICTION INVOKED.

This case is here on direct appeal from a judgment of the Supreme Court of Louisiana, jurisdiction being claimed under Judicial Code, Section 237 (a) [28 U. S. C. A., Section 344 (a)], due to the fact that an Act of Congress was declared unconstitutional.

Appellees have not filed any statement disclosing any matter or ground making against the jurisdiction of this Honorable Court and we have been advised informally that none will be tendered. Nevertheless, we affirmatively assume the burden, which rests on us, of showing jurisdiction.

The only issues raised by the pleadings in the lower court were challenges to the constitutionality of Section 402 (b) (2) of the Federal Revenue Act of 1942 [26 U. S. C. A. 811 (e) (2)] assailed as violating the uniformity provisions of Section 8 of Article One of the Federal Constitution and the due process clauses of the 5th Amendment thereto (R. 9). The matter was disposed of on stipulation which did not enlarge the pleadings (R. 10). Within the limits of the pleadings the trial court in its formal decree (R. 13) found the said Act of Congress to be unconstitutional on both the grounds urged. An appeal was taken to the Supreme Court of the State of Louisiana and the issues of constitutionality raised in the lower court, and these only, were argued to the court, except that in the Supreme Court of Louisiana an additional plea was filed, attacking Act 119 of the Louisiana Legislature for 1932, as sought to be interpreted herein, on the ground that it contravened the 14th Amendment to the Federal Constitution (R. 17).

The opinion of the Supreme Court of Louisiana purports to decide no matters other than the tendered constitutional questions. No exclusively non-Federal question was ever tendered. The decision of the Supreme Court of the State rests upon no non-Federal grounds. But for

the enactment of the assailed Federal statute, there would have been, and could have been no possible conflict between the parties. As a matter of exclusive state law, the Tax Collector could not have resisted the contention of appellees. He did resist it, solely upon the ground that Congress having made the measure of the Basic Estate Tax the valuation of the entire community, he was in turn bound by the mandatory provisioss of the State law to exact a State Inheritance Tax equal to eighty percent of that which the Federal Government was demanding by virtue of the statute under attack.

Thus, the sole issue in the case rested below, and rests here, upon the quantum of the Basic Estate Tax which is due the Federal Government: and that issue, in turn, rests upon the question of the constitutionality of Section 402 (b) of the Revenue Act of 1942.

Thus, it is impossible to dissociate from pleading or judgment the successful drawing in question by appellees of the constitutionality of the Federal Statute.

The case is one wherein an appeal lies to this Court as a matter of right (Section 237(a), Judicial Code, 28 U. S. C. A. 344, as amended by the Act of January 31, 1928, 45 Stat. 54); for it does not present a question of a Federal and non-Federal ground lying horizontally, side by side—their position is a vertical one, for the asserted non-Federal ground has utterly no foundation upon which to rest except the Federal statute here assailed as unconstitutional.

Hence, what this Court said in *Abie State Bank v. Bryan*, 282 U. S. 765, 773, 75 L. Ed. 690, is controlling:

> "But the federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157; Union P. R. Co. v. Public Serv. Commission, 248 U. S. 67, 69, 70; Ward v. Love County, 253 U. S. 17, 22; Broad River Power Co. v. South Carolina, 281 U. S. 537, 540, 282 U. S. 187, ante, 287. As this court said in Enterprise Irrig. Dist. vs. Farmers Mut. Canal Co., 243 U. S. 157, supra: 'But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain'. See Creswell v. Grand Lodge, K. P., 225 U. S. 246."

In the more recent case of *State Tax Commission v. Van Cott*, 306 U. S. 511, 514, 83 L. Ed. 950, this Court ordered up for review on certiorari a decision of the Supreme Court of Utah which had held that, under a provision of the State statute exempting from income tax "compensation for services rendered the United States in connection with the exercise of an essential governmental function", the salary of an attorney for the Reconstruction Finance Corporation was exempt. The decision of the State court rested upon decisions of this Court which the State court construed as holding that the attorney was exercising an essential governmental function.

When the case was submitted here, the Solicitor General appeared as *amicus curiae*, denying the jurisdiction of this Court on the ground that the case did not depend upon the solution of a Federal question. This Court said, however:

> "If the court were only incidentally referring to decisions of this Court in determining the meaning of the State law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question. But, if the State court did in fact intend alternatively to base its decision upon the State statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law."

In the subsequent case of *Breisch v. Central R. R. of New Jersey*, 312 U. S. 484, 491, 85 L. Ed. 965, this Court said:

> "'In the Van Cott case we were reviewing an application of Federal law by a State court to a solution of a State's problems",

a concise statement of the issue here, where the quantum of estate tax must depend absolutely upon the constitutional validity of a Federal statute, whose such validity is directly drawn in question by the pleadings, and which has been, by the highest court of the State, declared unconstitutional.

We do not urge that this Court has obligatory appellate jurisdiction under Judicial Code, Section 237 (a) Title 28, U. S. C. A., Section 344 (a), except as to the

ruling of the lower court on the constitutionality of the Federal statute measured by the 5th Amendment. However, the decision on the application of the State statute under the 14th Amendment was precisely for the same causes and reasons for the decision as to the constitutionality of the Act of Congress under the 5th Amendment. They are so interwoven that the decision on the one cannot be severed from the other. Moreover, should the Court conclude that the only issue in the case was the matter of the constitutionality of the State statute under which the tax herein is sought, then it is required to treat this appeal as a petition for writ of certiorari under Judicial Code, Section 237 (c), 28 U. S. C. A. 344 (c).

Such cases as *Miller's Executors v. Swann*, 150 U. S. 132, 37 L. Ed. 1028 and *Gully v. First National Bank*, 299 U. S. 109, 81 L. Ed. 70, argued in the State court by the representative of the United States, in no way militate against this Court's jurisdiction. In the recent case of *Colorado National Bank v. Bedford*, 310 U. S. 41, 47, 84 L. Ed. 1067, this Court, in sustaining its jurisdiction of a direct appeal to the Supreme Court of Colorado from a judgment sustaining as against an asserted Federal right the provisions of a State tax statute, said:

> "As the statute was held valid after the conclusion of the Supreme Court of Colorado that the manner of State taxation of national banks must accord with Rev. Stat., Sec. 5219, 12 USCA Sec. 548, and must not interfere with federal functions, it seems clear the federal question as to the validity of the statute as tested by the Constitution and laws of the United States was necessarily involved and decided. This gives this Court jurisdiction of the appeal.

"Gully v. First Nat. Bank, relied upon by the treasurer, dealt with the right to remove to a federal court because the cause of action arose under the federal laws, but the issue here is the right to appeal where a state statute is held valid against a defense of repugnancy to the same laws. The difference is brought out in the Gully case, where it is said: 'If there were no federal law permitting the taxation of shares in national banks a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense."

In neither of the cases referred to was there present, as here, the situation of a direct drawing into question of the validity of a Federal statute and the utter dependence of the State's contention upon that Federal statute's validity.

Smith v. Kansas City Title & T. Co., 255 U. S. 180, 65 L. Ed. 577, while dealing, not with the question of this Court's jurisdiction over a decision of a State court but with that of the original jurisdiction of the Federal District Court, is of interest in that this Court there rejected the contention (see dissenting opinion, page 215) advanced below by the Attorney General on his construction of *Miller v. Swann*. In *Smith v. Kansas City Title & T. Co.*, suit had been filed in the District Court to enjoin the defendant from investing its funds in Farm Loan bonds, the contention being that the Federal Farm Loan Act (39 Stat. 360, as amended 40 Stat. 431) was unconstitutional. Examining the question as to whether the suit was one arising

under the Federal Constitution, or under the State law, the Court, pointing out (page 201)

> "It is, therefore, apparent that the controvery concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue",

concluded:

> "The District Court had jurisdiction under the averments of the bill, and a direct appeal to this court upon constitutional grounds is authorized."

Here, it seems obvious that this case is not one in which a Federal question simply lurks in the background, or where a decision is sought of a State question upon the analogy of decisions upon parallel Federal issues. It is not a case where a State statute follows a Federal statute. It is a case where the power of the State sought to be exercised, depends wholly and entirely upon the validity of a Federal enactment. In such case, it is respectfully submitted, jurisdiction is clear.

STATEMENT OF THE CASE.

Sam Wiener, Jr., a Louisiana citizen, died in Caddo Parish, Louisiana, his domicile, leaving property standing in his name of a net valuation of $608,272.42 after the payment of debts, succession charges, etc., all of which was accumulated by him under the regime of the community which existed between the deceased and his wife who survived him.

In this succession, a rule was issued against the Tax Collector for Caddo Parish, Louisiana (R. 2), to fix the amount of the inheritance due the State of Louisiana, in which it was contended that the computation of the amount of the tax was to be made upon one-half of the estate only, to-wit, the sum of $304,186.21. The inheritance tax collector for Caddo Parish answered the rule setting up that in virtue of Paragraph 2 of Act 119 of the Legislature of Louisiana for the year 1932 (Dart's La. General Statutes, Vol. 6, Sec. 8582), the State of Louisiana was entitled to collect over and above the inheritance tax imposed by existing laws (Act 127 of 1921) an estate transfer tax, and contended that in the determination of the amount of this tax, the entire community should be taken as the basis of calculation rather than one-half thereof. Section 2 of Act 119 of 1932 reads:

> "Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

This permissive provision in the Federal Revenue Act providing for this credit is set forth in Appendix A.

This contention that the computation should be on the whole rather than the one-half was due to a provision

in the Revenue Act of Congress for 1942, Section 402 (b) (2) 26 U. S. C. A., Sec. 811 (e) (2), whereby Congress included in the taxable estate of a decedent any interest which he might have held in community with his surviving spouse. This section reads:

> "*Community Interests.* To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

No part of this estate was compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

Section 4 of Act 119 of 1932 enjoins on the tax collecting authorities of Louisiana a liberal interpretation of the act to the end that there be gained for the Treasury of the State of Louisiana the full extent of the 80% credit (See Appendix B for this excerpt).

At this juncture, a formal plea to the constitutionality of the said Act of Congress was filed (R. 9), alleging

that the same was in contravention of Section 8 of Article One of the Constitution of the United States (which provision requires geographic uniformity in the imposition of excise taxes) and in contravention of the Fifth Amendment to the Constitution of the United States in that the Succession would be required to pay taxes upon property not belonging to it as determined by the law of the State.

The facts were stipulated (R. 10). The inheritance tax, strictly speaking, amounts to $8,224.09. The Inheritance Tax Collector claims an additional sum of $6,106.81 as an Estate Tax under the provisions of Section 2 of Act 119 of 1932. The Court will note that in the stipulation and in the pleadings, all the taxes are improperly referred to as "inheritance taxes", whereas in truth and in fact, only the sum of $8,224.09 is an inheritance tax and the sum of $6,106.81 claimed by the Collector, is an Estate Transfer Tax.

The District Court sustained the plea of unconstitutionality (R. 13) on both grounds, holding that it violated the uniformity requirements of Section 8 of Article One of the Constitution and of the due process clause of the 5th Amendment thereto. In the Supreme Court of Louisiana an additional plea of unconstitutionality was filed (R. 17) urging that Act 119 of 1932 of the Louisiana Legislature as it was sought to be interpreted herein violated the 14th Amendment to the Constitution of the United States. The Supreme Court of Louisiana affirmed the decision of the lower court (R. 19).

SPECIFICATION OF ERRORS.

Appellant asserts that the Court below was in error in the following respects:

(1) The Supreme Court of the State of Louisiana erred herein in holding that Section 402 (b) (2) of the Federal Revenue Act of 1942 was unconstitutional because violating the 5th amendment to the Federal Constitution.

(2) The Supreme Court of the State of Louisiana erred in holding that Act 119 of 1932 of the Legislature of the State of Louisiana was unconstitutional, as sought to be interpreted by appellant because violating the 14th amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

We will endeavor to show that, conceding that the wife's interest in the community in Louisiana vests with its acquisition and is no mere expectancy, still it is far short of a full interest and lacks most of the attributes of ownership; that her interests are hedged about and restricted by her husband's equal, and in most respects, superior interests; that these restrictions end with her husband's death and because of it she has added to her community moiety for the first time important rights not theretofore enjoyed; that death is the "generating" cause of these additions within the rationale of the cases of *U. S. v. Jacobs*, 306 U. S. 363, 83 L. Ed. 763, and *Tyler v. United States*, 281 U. S. 496, 74 L. Ed. 991, making the wife's one-half interest in the community property a part of the taxable estate of her deceased husband.

ARGUMENT.

The appellees contend that death under Louisiana law is not the "generating" source of the rights of the surviving wife in the community property; and that as to Mrs. Wiener who survived her husband, one-half of the estate came to her not as a result of death, but to the contrary was her property throughout the period of the community and existed prior to death. It is argued that her one-half of the community forms no part of the decedent's estate and that to include her one-half in the decedent's estate is to compel her to pay taxes in part measured by the property of another. Thus substantially was the finding of the Supreme Court of Louisiana in this case.

Our position is that, conceding the full import of the decisions below and of *Phillips v. Phillips*, 160 La. 813, 107 So. 584 and *Bender v. Pfaff*, 282 U. S. 127, 75 L. Ed. 252, that the wife's interest is simultaneously vested with its acquisition, still that is not decisive of the issue here. The inquiry here is whether the deceased husband had and enjoyed certain rights or privileges quoad the wife's one-half interest in the community prior to his death; for it is the interest that *ceased* at death and not what is transferred which is within the reach of the Federal Estate Tax.

Said this Court in *Y. M. C. A. v. Davis*, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558:

> "It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest

to which the legatees and devisees succeeded on death, but the interest which ceased by reason of his death."

We do not urge that the wife inherits from her husband in Louisiana; we merely contend that many important incidents of ownership—inherent in her husband's dominion and control over all the community property during life—are denied to the wife until the husband's death.

What we urge is not in derogation of the definition and character of the community property as found by the Supreme Court of Louisiana in this case and in *Phillips v. Phillips*, supra. Actually the decision below recognized this dominion and control of the husband (R. 28). This dominion is complete and exclusive. Article No. 2404 of the Revised Civil Code provides as follows:

"HUSBAND MASTER OF COMMUNITY—Gratuitous and fraudulent conveyances.—The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, *without the consent and permission of his wife.*" (Italics ours).

"He can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefits of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of

the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactory proving the fraud."

"Only the husband may judicially vindicate a community right", *Succession of Howell*, 177 La. 276, 148 So. 48. This means that the wife has no standing in Court in any event, even to assert a community interest against a trespasser. The husband may even make a gratuitous donation of the movable property (personal) of the community. (Revised Civil Code 2404). Even if the title to the community property should stand in the name of the wife, she cannot alienate or mortgage it without the husband's concurrence and direction. *Bywater v. Enderle*, 175 La. 1098, 145 So. 118.

The husband's relation to the community property is so intimate that he is personally liable for the community debts and can be made to meet them out of his separate property. *Hellberg v. Hyland*, 168 La. 493, 122 So. 593, while the wife's relationship is so remote that she is not personally liable out of her separate property for the community debts. See *Succession of Clark*, 27 La. Ann. 269; *Winter v. Gani*, 199 So. 600.

Upon the death of the wife the husband retains the property and continues to be the agent of the community to pay the debts. *Kremer v. Kremer*, 121 La. 484, 46 So. 600.

The revenues of the community property go to the husband and the wife cannot claim them as such, but can claim from her husband only the necessaries of life (Revised Civil Code 120. (Appendix C).

Of all the elements which make up that bundle of rights and privileges called ownership, very likely the most important is the right of dominion—the right to alienate and control and that is what the wife in Louisiana gets by the death of her husband. Death is the liberating event to the wife. For the first time she has title to her property in the sense that she is capable of conveying it, mortgaging it, or making a donation *inter vivos*. For the first time she can take the revenues of her property; for the first time in any real sense she can call it her own.

DECISION BELOW.

The Court below misconstrued *Tyler v. United States*, supra. The basis of the decision in the *Tyler* case is the following language of the Court:

> "Before the death of the husband (to take the Tyler Case, No. 428) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; but her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will."

The Court below concluded that the *Tyler* decision was based in part upon the amiable fiction of the common law that the husband and wife were one and that each

owned every part and the whole, but the Court specifically rejected this in these words:

> "This view, when applied to a taxing act, seems quite unsubstantial."

The Court further sought to distinguish the cases upon the conclusion that in the *Tyler* case the Court was moved to its decision by a consideration of the fact that no part of the property originally belonged to the wife. However, the Court considered that feature only for the purpose of showing that the case was not excepted by these words of the statute:

> "Except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

This exception is comparable to the exceptions in the act under consideration here which excludes from the estate such part as is attributable to the separate estate of the surviving spouse or compensation for personal services to the surviving spouse, etc.

In discussing the case of *United States v. Jacobs*, supra, the Court below repeated the same error that it made in its estimate of the *Tyler* case in that it assumed that the pivotal reasons for the decision were this fictional unity of husband and wife and the fact that the surviving tenant did not contribute towards the creation of the joint tenancy. That the fiction of unity of husband and wife was not the basis of the decision, but was expressly rejected is this language of the Court in the *Jacobs* case, 306 U. S. 369:

> "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such

> shadowy and intricate distinctions of common law property concepts and ancient fictions."

Moreover, it is apparent that the Court in referring to the circumstance that the surviving tenant contributed nothing was to show that the Government was not concluded by the statutory exceptions to this effect. The deciding reasons for the Court's opinion in the *Jacobs* case is this language:

> "Upon the death of her co-tenant, she for the first time, becomes possessed of the sole right to sell the entire property without risk of loss, which might have resulted from partition or separate sale of her interest while the decedent lived. There was—at his death—a distinct shifting of economic interest, a decided change for the survivor's benefit."

The words immediately above quoted are accurately appropriate to a description of the change in the Louisiana wife's interest as to her community moiety occurring at the death of her husband. In fact, a joint tenancy, as it existed in Illinois (See 96 F. 2d. 784, where this feature of the *Jacobs* case was discussed at length) could be terminated by each tenant by partition or by outright sale. Each had a right to mortgage it, or subject it to a lien; each had a right directly to take the fruits. In Louisiana, all of these important incidents to ownership are denied to the wife as to any part of the community property. The only advantage which the wife has in the community property in Louisiana over the right of the tenant in a joint tenancy in Illinois is that the wife in Louisiana has the right of testamentary disposition, but this is more than compensated for by the fact that other and probably more important advantages of ownership are denied to her.

The mere fact that the wife in Louisiana has a present vested interest should not cloak her interest from subjection to the Federal Estate Tax. It is manifest that in the tenancy dealt with in the *Jacobs* case, each tenant had a present vested interest of much more immediate consequence than does the wife in Louisiana.

BENDER v. PFAFF NO BAR.

Bender v. Pfaff, supra, should not be a bar here. In that case the Court was concerned merely with construction of an Act of Congress and there was involved no question as to the power of Congress. The Power of Congress to include the community, if it desired, is entirely left open by that case. This is apparent from the following language of this Court, in the case of *Poe v. Seaborn*, 282 U. S. 101, 75 L. Ed. 239 (dealing with community property income from the State of Washington, as *Bender v. Pfaff* dealt with it from Louisiana):

> "The case requires us to construe Sec. 210 (a) and 211 (a) of the Revenue Act of 1926 and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon the net income of every individual. The act goes no farther, and *furnishes no other standard or definition* of what constitutes an individual's income. The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of *further definition by Congress, should impute a broader significance to the phrase.*" (Italics ours).

Nor should the fact that the husband has only a restricted interest in the wife's share of the community

militate against its taxability. The wife can claim her share of the community property prior to death in the infrequent case where the disorder in the husband's affairs is such that her property rights are jeopardized (Revised Civil Code 2425); and when she obtains a separation *a mensa et thoro* or divorce. Rights of equal or more substance than these did not prevent the incidence of the tax in *U. S. v. Jacobs*, supra, where each tenant prior to death could of his own volition partition the res of the tenancy and sell or mortgage his interest and could possess and enjoy directly the fruits of his share of the tenancy.

LOUISIANA COMMUNITY NOT COMMERCIAL PARTNERSHIP.

The Court below broadly assimilated the Louisiana community to a commercial partnership and inferred therefrom that it would be as capricious to tax to the decedent's estate the interest of the surviving spouse, as it would be to tax to the surviving partner the decedent partner's interest in the partnership. There are similarities, of course, between the Louisiana community and a partnership, but the fact of similarities could not alone make it such. As well say that joint tenancies and tenancies by the entirety, taxable under the law, are partnerships because they have many of the indicia of ordinary partnerships. They are alike in joint ownership of the res and the income therefrom—joint possession and right of management and joint obligation for losses; in fact, differing from the ordinary partnership substantially, only in the fact of survivorship. These similarities to partnership did not gain freedom from the subjection to the Federal Estate Tax.

Mere badges and words may prove deceptive and do not conclude the Congress in its taxing power. Congress is permitted to look through definitions and find the realities for itself. Said this Court in *Tyler v. United States*, at 201 U. S. 502:

> "But mere names and definitions, however important as aids to understanding, do not conclude the lawmaker, who is free to ignore them and adopt his own. Karnuth vs. United States, 279 U. S. 231, 242, 73 L. ed. 677, 682, 49 Sup. Ct. Rep. 274."

The laws relating to partnerships in Louisiana are segregated from the laws relating to successions, and inheritances and are embraced in Articles 2801 to 2890, inclusive of the Revised Civil Code of Louisiana (See Appendix D for pertinent excerpts). The decision below could not mean that the community of acquets and gains existing between husband and wife in Louisiana is a mere commercial partnership, because Louisiana Revised Civil Code, No. 2807, reads:

> "MARRIAGE—COMMUNITY PROPERTY—NO PARTNERSHIP.—The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code."

See *Succession of Boyer*, 36 La. Ann. 506; *Baird v. Lemee*, 23 La. Ann. 424; *Mackenroth v. Pelke*, 171 La. 842, 132 So. 365.

The Louisiana community has many distinguishing features from partnerships. A partnership is defined as a commutative contract between two or more persons looking to profit (Revised Civil Code 2801, Appendix D), whereas the community property is a creature of law ordained as an

incident to the marriage relation. Unlike partnership, there is no equality of right in management; the husband can make a gratuitous donation of part of the res of the community, the movable property, and most importantly the wife has no obligation for the community debts. The community cannot be dissolved at the mere will of either party, but is dissolved only as the law directs. Bankruptcy or interdiction of either party does not dissolve it, as it does a partnership (Revised Rivil Code 2876, Appendix D). Donations made to husband and wife jointly become by law part of the community assets (Revised Civil Code 2402, Appendix E), contrary to ordinary partnerships. All income and revenues of the separate property of the husband administered by him belong to the community (*Peters v. Klein*, 161 La. 664). All income and revenues of the separate and paraphernal property of the wife administered by the husband belong to the community (*Falconer v. Falconer*, 167 La. 595, 120 So. 19).

If analogies are to be indulged in, a near approach to the wife's interest in the Louisiana community is the dower provision in the common law states. The dower interest of the wife and the community interest of the wife in Louisiana are alike in that they measure the wife's participation in property controlled by the husband at death. The dower interests were made taxable in 1926 (26 U. S. C. A., Section 811 (b)). This dower provision has been held constitutional, see *Allen v. Henggeler*, 32 F. 2d. 69, a case coming from Nebraska. It is interesting to note that in Nebraska the wife's dower interest was vested and present. The Court described it thus:

> "The husband is, in effect, the managing agent and has control of the property. He can sell and dispose

> of it, or he may exchange it for other property. But at his death her interest therein comes to her in her own right. It does not pass to her by will, or by the intestate laws of the state. The husband cannot deprive her of that right. Gaster v. Estate of Gaster, 92 Neb. 6 (137 N. W. 900)."

How appropriate that language would be in describing the interest of the wife in the community in Louisiana!

IS THE ACT ARBITRARY AND CAPRICIOUS?

It certainly cannot be arbitrary and capricious in the generality of its application because a prime reason of Congress, aside from a desire to get revenue, was to neutralize advantages inherent in the community property systems. The Committee of the Senate in favorably reporting this section said in reference to it (see S. Report 1631, 77th Cong. 2d. Session, page 231):

> "This section, which corresponds to section 402 of the bill passed by the House, *eliminates special estate tax privileges enjoyed by virtue of the community property system.*" (Italics ours).

It could not be arbitrary and capricious as applied to these legatees because they do not claim that their mother (under the exceptions in the act) contributed to this estate through compensation for her personal services or income from such a fund or by virtue of her separate estate. Obviously, this is the average case, where, upon marriage the wife goes into the home and the husband into business, in which case the accumulations are more immediately due to the husband's exertions than the wife's. If the wife did not go in the home and did not go on salary, but to the contrary, into a business separate from her hus-

band, her earnings therefrom would have been her separate property (Revised Civil Code, Article 2334, Appendix F).

FOURTEENTH AMENDMENT.

The case of *Moffitt v. Kelly*, 218 U. S. 400, 54 L. Ed. 1086, sets at naught the contention that Act 119 of 1932 of the Louisiana Legislature violates the 14th Amendment to the Federal Constitution. In this connection, it is to be observed that the said act of the Louisiana Legislature is not claimed to be infirm by the yard stick of the State Constitution, the legatees relying in this respect on the 14th Amendment to the Federal Constitution.

In the *Moffitt v. Kelly* case the Court said in part, 218 U. S. 404:

> "* * * it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. * * *"

Respectfully submitted,

EUGENE STANLEY,
Attorney General;
HARRY V. BOOTH,
LEONARD L. LOCKARD,
Counsel for Appellant.

BOOTH & LOCKARD,
Of Counsel.

APPENDIX A.

Tit. 26 U. S. C. A., Sec. 813 (b) Estate, succession, legacy, and inheritance taxes. The tax imposed by section 810 or 860 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 or 860 (before deducting from such tax the credits provided by section 813 (a) (1) and (2), and shall include only such taxes as were actually paid and credit therefor claimed within four years after the filing of the return required by section 821 or 864, except that—

(1) If a petition for redetermination of a deficiency has been filed with the Board of Tax Appeals within the time prescribed in section 871, then within such four-year period or before the expiration of 60 days after the decision of the Board becomes final.

(2) If, under section 822 (a) (2) or section 871 (a), an extension of time has been granted for payment of the tax shown on the return or of a deficiency, then within such four-year period or before the date of the expiration of the period of the extension.

Refund based on the credit may (despite the provisions of sections 910 to 912, inclusive), be made if claim therefor is filed within the period above provided. Any such re-

fund shall be made without interest. As amended Mar. 17, 1941, c. 21, Sec. 1, 55 Stat. 45; Oct. 21, 1942, 4:30 p. m., E. W. T., c. 619, Title IV, Sec. 410, 56 Stat. ... .

APPENDIX B.

Sec. 4 of Act 119 of 1932, Dart's La. General Statutes, Sec. 8584. Intent and purpose of act.—It is hereby declared to be the intent and purpose of this act to obtain for this state the benefit of the credit allowed under the provisions of Title III, section three hundred and one, subsection (b), of the Federal Revenue Act of nineteen hundred twenty-six to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose.

APPENDIX C.

Revised Civil Code No. 120. HUSBAND AND WIFE—RECIPROCAL DUTIES.—The wife is bound to live with her husband to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

APPENDIX D.

Revised Civil Code No. 2801. DEFINITION.—Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit,

skill, or industry, furnished in determined proportions by the parties.

Revised Civil Code 2876. TERMINATION—METHODS AND CAUSES.—A partnership ends:

1. —
2. —
3. By the death of one of the partners, or by his interdiction.
4. By his bankruptcy.
5. —

APPENDIX E.

Revised Civil Code 2402. PROPERTY FORMING COMMUNITY—PERSONAL INJURIES TO WIFE.—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

APPENDIX F.

Revised Civil Code 2334. SEPARATE AND COMMON PROPERTY OF SPOUSES.—The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.